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July 11, 1996

Mr. Jay Markley
Federal Communications Commission
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Re: Ex Parte Filing
CC Docket Nos. 95-185 and 96-98

Dear ~~Mr. Markley~~ Jay:

As you requested from Cathy Massey, on behalf of AT&T Wireless Communications, Inc., attached is a white paper that discusses various LEC-to-CMRS interconnection issues.

Should you have any questions regarding this matter, kindly contact the undersigned.

Sincerely,

Sara F. Seidman

Enclosure

cc (w/encl.):
Larry Atlas
Karen Brinkmann
Jackie Chorney
James Coletharp
Michelle Farquhar
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F1/55538.1

The 1996 Act's Nondiscrimination Requirements Should Apply to LEC-to-CMRS Interconnection

Preemption of Inconsistent State Interconnection Policies. The records in the proceedings in CC Docket Nos. 96-98 and 95-185 demonstrate that many existing State interconnection policies discriminate against CMRS providers vis a vis other new entrants. For example, in Connecticut, the Department of Public Utility Control ("DPUC") expressly prohibits the local telephone company from entering into reciprocal compensation agreements with wireless carriers.[1] The mutual compensation rules adopted by the California PUC ("CPUC") do not explicitly exclude wireless carriers, but they condition eligibility for such compensation on certification as a competitive local carrier.[2] The CPUC has granted such certification to wireline carriers that submit to its entry and rate regulation, including, among other things, tariff and contract filing, prior notification of rate changes, and approval before discontinuing service.[3]

In addition to the lack of mutual compensation, States regularly permit LECs to charge wireless carriers significantly higher rates than competitive LECs ("CLECs") for intrastate interconnection.[4] For instance, in New York CLECs pay less than a penny per minute for intrastate interconnection. Wireless providers, by contrast, pay an average of 2.2 cents per minute. To assert the right to intercarrier compensation at the rates given to other carriers, a wireless provider must be certified to provide local exchange service.[5] Similarly,

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[1] See Letter from Cathleen A. Massey, AT&T Wireless Services, Inc. ("AT&T Wireless"), to William Caton, Secretary, Federal Communications Commission, CC Docket No. 95-185, at 2 (July 2, 1995) ("AT&T Wireless Ex Parte") (citing State of Connecticut Department of Public Utility Control, Investigation into Wireless Mutual Compensation Plans, Docket No. 95-04-04, Decision, September 22, 1995).

[2] Id. at 2-3 (citing California Public Utilities Commission, Competition for Local Exchange Service, D.95-07-054, R.95-04-043, I.95-04-044, at 15, 35 (July 24, 1995) ("CPUC Order")).

[3] Id. at 3. The CPUC recognizes that it is preempted from regulating entry and rates of CMRS providers. It nonetheless appears to require wireless providers to meet the entry and rate eligibility criteria for mutual compensation. Id.

[4] AT&T Wireless points out that CMRS interconnection rates are so much higher than those charged to CLECs that various CLECs have recently offered AT&T Wireless interconnection services at a markup over the rates they receive from LECs. AT&T Wireless Ex Parte at 3.

[5] See Comments of AT&T Corp., CC Docket No. 95-185, at 27 (March 4, 1996); New York State Department of Public Service, Opinion and Order Adopting Regulatory Framework, Case 94-C-0095, at 22-23 (May 22, 1996) ("NYDPS Framework Order"). Certification, in turn, requires carriers to file tariffs and provide a number of services, such as 911 access and Lifeline service, as well as contribute to the statewide relay access system and comply with the NYDPS's Open Network Architecture principles and service quality standards. Id. at 22-23. See also New York State Department of Public Service, Order Instituting Framework for Directory Listings, Interconnection and Intercarrier Compensation, Case 94-C-0095 (September 27, 1995).

as AirTouch Communications asserts, LEC-to-CMRS interconnection rates are well in excess of costs, "sometimes as high as a thousand percent above incremental costs."[6]

The States' comments in CC Docket No. 96-98 demonstrate that at least several anticipate retaining their current discriminatory policies under the new regime mandated by Sections 251 and 252. The NYDPS, for example, argues that its "pay-or-play" plan, whereby only full-service providers are entitled to reduced interconnection charges (while charging undiscounted rates to "selective" carriers), is entirely consistent with the 1996 Act.[7] The Michigan Staff asserts that "only if a [CMRS] provider is licensed as a provider of basic local exchange service . . . would it be eligible for the appropriate aspects of local interconnection, such as local call termination compensation."[8] The Florida Public Service Commission contends that Section 251 would not apply to interconnection between an incumbent LEC and a CMRS provider with a local calling scope that covers multiple ILEC exchanges.[9]

This existing and proposed discriminatory treatment of CMRS providers is inconsistent with the requirements of Sections 251 and 252.[10] It also violates Section 332 because it would prevent implementation of a uniform and coherent national regulatory regime that fosters the growth and development of wireless services.[11] Moreover, critical features of the State plans constitute rate or entry regulation of wireless carriers that has been

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[6] See Ex Parte Filing of AirTouch Communications, CC Docket Nos. 95-185 and 96-98 (July 8, 1996) (proposing interim relief for CMRS providers).

[7] Comments of the NYDPS at 14-18.

[8] Comments of Michigan Public Service Commission Staff ("Michigan Staff") at 20.

[9] Comments of Florida Public Service Commission at 35-36.

[10] See 47 U.S.C. § 251(c)(2)(D) (rates, terms, and conditions for interconnection must be "nondiscriminatory"); id. § 252(d)(2)(A) (charges for transport and termination must provide for the "mutual and reciprocal" recovery of costs by each carrier). In the wireless context, the Commission has long held that CMRS providers are entitled to "reasonable and fair interconnection" at nondiscriminatory rates and that mutual compensation is a primary element of this "reasonable interconnection" obligation. Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1497-98, ¶¶ 230-233 (1994) ("Second Report and Order"), citing Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2915 (1987) ("Interconnection Order"); see also Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, Notice of Proposed Rulemaking, CC Docket No. 95-185, FCC No. 95-505 at ¶ 110 (released Jan. 11, 1996).

[11] See H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993).

explicitly preempted under Section 332.[12] States should not be permitted to condition the right to nondiscriminatory treatment on a willingness by CMRS providers to relinquish the freedom from rate and entry regulation conferred by Section 332(c).[13] Wireless carriers' acceptance of certification and rate obligations plainly is not "voluntary" in this context. As soon as one carrier accepts these requirements to obtain the lower interconnection rate or mutual compensation, competition would require others to do so as well. ILECs must be directed to provide interconnection and reciprocal compensation to requesting telecommunications carriers on nondiscriminatory rates, terms and conditions, based solely on the service requested, not on the identity of the requestor. To the extent State policies provide otherwise, they should be expressly precluded as of the effective date of the Order in CC Docket No. 96-98.

The Commission has ample authority under the 1996 Act, Section 332, and judicial precedent to preclude conflicting State laws and policies. Section 251(d)(3) directs the Commission to preempt inconsistent State interconnection regulations or regulations that "substantially prevent implementation of [Section 251] and the purposes of [the 1996 Act]."[14] Furthermore, because these State policies stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[15] as set forth in Section 332, the Commission has the power to prevent their effectiveness.[16]

The Commission's authority to preempt the States in this respect is reinforced by Section 252(i), which assures the availability of negotiated interconnection agreements to all

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[12] The provisions of State orders and policies that amount to prohibited rate or entry regulation include certification and tariff filing requirements, prior notification of rate changes, approval before discontinuing service, and requirements that carriers provide specific services, such as residential, Lifeline, and business services, or comply with specified service boundaries. See, e.g., NYDPS Framework Order at 22; CPUC Order at 35-36.

[13] Since 1987, the Commission has made clear its authority to preempt State interconnection rate policies that "effectively preclude interconnection" and thereby "negate the federal decision to permit interconnection." Second Report and Order, 9 FCC Rcd at 1497, ¶ 228, citing Interconnection Order, 2 FCC Rcd at 2912.

[14] 47 U.S.C. § 251(d)(3).

[15] Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 151 (1982) (citations omitted).

[16] Id. at 154-155 ("Federal regulations have no less pre-emptive effect than federal statutes."). Even in Louisiana Public Service Commission v. FCC, the Court held that "a federal agency may preempt state law . . . when and if it is acting within the scope of its congressionally delegated authority." 476 U.S. 355, 374.

telecommunications carriers, including CMRS providers.[17] The arguments of some ILECs that CMRS providers are not entitled to make use of these agreements and have no right to reciprocal compensation and nondiscriminatory interconnection rates because they are not classified as "LECs" is contrary to the plain language of the statute.[18] As the Commission stated in the Notice in CC Docket No. 96-98, CMRS providers fall within the definition of "telecommunications carrier[s]" set forth in Section 3(44) of the 1996 Act.[19] Based on ample precedent, the Commission should likewise find that CMRS operators are providers of "telephone exchange service" for purposes of requesting interconnection under Section 251(c)(2).[20] As telecommunications carriers, CMRS providers are entitled to the terms and conditions of previously negotiated interconnection agreements.

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[17] 47 U.S.C. § 252(i). Section 252(i) was intended to "help prevent discrimination among carriers and to make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated." S. Rep. No. 104-23, 104th Cong., 1st Sess. 22 (1995). ILECs are separately obligated by virtue of Section 251(c) to provide nondiscriminatory interconnection rates to requesting telecommunications providers. Thus, the burden will be on an ILEC that chooses to impose different charges on the second carrier to demonstrate why such action is consistent with Section 251(c).

[18] While factors directly related to the costs of providing interconnection, such as significant variations in the volume of service or duration of contract, might constitute a reasonable basis for charging different carriers different rates, the Commission should scrutinize carefully any attempts by ILECs to distinguish between CLECs and CMRS providers. For example, under 252(i) it would not be permissible for ILECs to insist upon a particular balance of traffic with the requesting carrier's network as a precondition to providing the same rates, terms and conditions -- including bill and keep -- as set forth in the other agreement. Even if traffic is not balanced, bill and keep is economically justified for LEC-to-CMRS interconnection because the traffic imbalance is offset by the differences in costs to each network of terminating traffic that originates on the other. See Declaration of Bruce M. Owen at ¶ 9, attached as Exhibit B to AT&T Corp. Comments, CC Docket No. 95-185 (the traffic-sensitive nature of the CMRS network and the complexity of wireless call routing and completion result in higher costs for CMRS termination services); Comments of Cox Enterprises, Inc., CC Docket No. 95-185, at 20-21 (March 4, 1996) (referencing Brock studies filed in Docket No. 94-54, which demonstrate that bill and keep is efficient for LEC-to-CMRS interconnection because the LEC costs of terminating traffic are so low that there is little difference between a cost-based and zero rate).

[19] Notice, CC Docket No. 96-98, at ¶ 168.

[20] The Commission has historically treated cellular service as telephone exchange service. See, e.g., American Telephone and Telegraph Co. Request for Approval of Capitalization Plan for ATT Cellular Co., Memorandum Opinion and Order, 53 R.R. 2d. 1083, 1087 (1983); MTS and WATS Market Structure, Memorandum Opinion and Order, 97 FCC 2d 834, 882 (1984); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 R.R. 2d 1275, 1278, 1284 (1986); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, Declaratory Ruling, 2 FCC Rcd 2910, 2916 (1987).

Fresh Look. To the extent existing contracts between CMRS providers and ILECs are not in compliance with the policies adopted in this Order, the Commission should institute a "fresh look" requirement that allows CMRS providers to terminate and renegotiate agreements consistent with the congressional and agency objectives. In the past, the Commission has adopted a fresh look policy in situations where requiring the continuation of contracts would be contrary to the public interest.[21] The Commission has legal authority to adopt this fresh look policy under applicable precedent, which provides that an agency may modify the terms of contracts between two carriers when it determines that the existing terms would "adversely affect the public interest."[22] As the Commission stated in the Expanded Interconnection proceeding, fresh look does not constitute an unlawful rate prescription because LEC charges in excess of those set forth in the order would "deprive customers of the benefits of competition and tend to 'lock up' the interstate access market if they were allowed to continue."[23] In the case of LEC-to-CMRS interconnection, the Commission should find that the public interest would be adversely affected by a continuation of agreements that disregard the requirements of nondiscriminatory rates and mutual compensation. Accordingly, it should adopt a fresh look policy that gives CMRS providers the option of terminating and renegotiating existing interconnection agreements with LECs for a 12-month period commencing on the effective date of the Order in CC Docket No. 96-98.

Enforcement. While the Commission can set forth its policies with sufficient clarity to give States and carriers ample guidance regarding the types of regulations and interconnection practices that are allowable, there are several avenues available to CMRS providers that encounter inconsistent State and ILEC policies. CMRS providers may file petitions for declaratory ruling under Section 332(c)(3) that a particular State requirement constitutes prohibited rate or entry regulation.[24] Wireless providers may also ask the

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[21] See e.g., Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order, 7 FCC Rcd 7369, 7463-7464 (1992); Second Memorandum Opinion and Order and Order on Reconsideration, 8 FCC Rcd 7341, 7345-7358 (1993) ("Expanded Interconnection Second MO&O") (fresh look is necessary "to allow eligible customers to assess the new alternatives available in a more competitive market"); Second Report and Order, 8 FCC Rcd 7374 (1993); Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994).

[22] Federal Power Comm'n v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956); Western Union Telegraph Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("Under the Mobile-Sierra doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest.")

[23] Expanded Interconnection Second MO&O, 8 FCC Rcd at 7347.

[24] 47 C.F.R. § 332(c)(3) (absent grant of a State petition to regulate CMRS rates, "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service").

Commission to institute a proceeding pursuant to Section 253(d) to preempt the enforcement of such State or local government statutes, regulations or legal requirements that constitute barriers to entry.[25] In addition, Section 252(e)(5) allows a CMRS provider to inform the Commission if a State fails to carry out its responsibilities under the 1996 Act, including the assurance of nondiscriminatory interconnection and reciprocal compensation. In that event, the Commission is required to preempt the State commission's jurisdiction of that proceeding or matter within 90 days and assume the duties of the State commission itself.[26] Finally, Section 208 of the Communications Act remains available to CMRS providers to file complaints against carriers that fail to comply with any provision of the Act or the Commission's regulations.[27]

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[25] 47 U.S.C. § 253(d). Section 253(e) makes clear that a proceeding under this section is in addition to, not in lieu of, the ability of CMRS providers to seek a declaratory ruling under 47 U.S.C. § 332(c)(3) that State regulations are precluded as rate or entry regulation. 47 U.S.C. § 253(e).

[26] 47 U.S.C. § 252(e)(5).

[27] 47 U.S.C. § 208.